In the Supreme Court of the United States

OCTOBER TERM 1976

No. 76-1797

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
a Corporation,

Petitioner,

vs.

RONALD DEAN JOHNSON

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of California, First Appellate District

B. CLYDE HUTCHINSON
601 California Street
San Francisco, California 94108
Attorney for Petitioner
Southern Pacific
Transportation Company

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

INDEX

TABLE OF AUTHORITIES

OTHER AUTHORITY

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To the Honorable Warren Burger, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

This is an action by a railroad worker against his employer for damages for personal injuries suffered in the course of his employment. The action was brought by respondent Ronald Dean Johnson (hereinafter "respondent") against petitioner Southern Pacific Transportation Company (hereinafter "petitioner") under the Federal Employers' Liability Act (45 U.S.C. § 51 et seq.) and the Federal Safety Appliance Act (45 U.S.C. § 1 et seq.). Pur-

suant to a jury verdict, the Superior Court of California (hereinafter "the trial court") entered judgment for respondent in the amount of $460,587.13. The judgment was affirmed by the Court of Appeal of California, First Appellate District (hereinafter "the Court of Appeal").

As will be shown more fully below, the judgment and opinion of the Court of Appeal is erroneous for two reasons: (1) the Court of Appeal improperly applied the standard applicable in an action brought under the Federal Employers' Liability Act for determining whether the evidence requires submission of the issue of contributory negligence to the jury; and (2) the Court of Appeal incorrectly held that a trial court is not required to instruct the jury, in an action brought under the Federal Employers' Liability Act, that any award of damages to the plaintiff will not be subject to income taxation. This Court should determine these issues for the reasons, among others set forth below, that such issues are of substantial importance in the correct and uniform administration of the F.E.L.A., neither issue has yet been considered by this Court, and the decisions of other appellate courts are in substantial conflict concerning such issues. Accordingly, petitioner prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal. Petitioner respectfully shows as follows:

I.

OPINION BELOW

The opinion of the Court of Appeal is not reported, either officially or unofficially. It is set forth in Appendix A hereto. No opinion was rendered by any other court in connection with this case.

II.

JURISDICTION

The judgment and opinion of the Court of Appeal, the judgment sought to be reviewed herein, was entered and filed on January 27, 1977 (App. A). The Court of Appeal denied a timely petition for rehearing on February 18, 1977 by an order reproduced in Appendix B. A timely petition for a hearing in the California Supreme Court was denied on March 24, 1977 by an order reproduced in Appendix C. This petition was filed within 90 days of the date last mentioned and therefore is timely. (*American Railway Exp. Co. v. Levee* (1923) 263 U.S. 19, 20-21.) There has been no order granting an extension of time to petition for certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), for the reason that the questions presented in this petition are federal questions of substantial importance in the correct and uniform administration of the Federal Employers' Liability Act. (*Rogers v. Missouri P. R. Co.* (1957) 352 U.S. 500, 509; *Brown v. Western Railway of Alabama* (1949) 338 U.S. 294, 295.)

III.

QUESTIONS PRESENTED

A. The first question presented for review is whether the Court of Appeal improperly applied the standard applicable in an action brought under the Federal Employers' Liability Act for determining whether the evidence requires submission of the issue of contributory negligence to the jury.

B. The second question presented is whether, in an action brought under the Federal Employers' Liability Act,

the jury should be instructed that any award of damages to the plaintiff will not be subject to income taxation.

IV.

STATUTES INVOLVED

This action was tried under the Federal Employers' Liability Act (45 U.S.C. § 51 et seq.) and the Federal Safety Appliance Act (45 U.S.C. § 1 et seq.) The portions of the F.E.L.A. pertinent herein are 45 U.S.C. §§ 51 [35 Stat. 65, as amended 53 Stat. 1404] and 53 [35 Stat. 616]. The pertinent portion of the Federal Safety Appliance Act is 45 U.S.C. § 11 [36 Stat. 298]. Other statutes involved in the case are federal and state statutes establishing the nontaxability of awards of damages for personal injuries. (26 U.S.C. § 104 [68A Stat. 30, as amended 74 Stat. 847, 76 Stat. 829, 90 Stat. 1567, 1568, 1766]; Ore. Rev. Stat., § 316-062 [1969 C. 493 S. 14]; Cal. Rev. & Tax Code § 17138 [Stats. 1969, ch. 1607, § 4].) Another pertinent statute sets forth the California practice regarding exceptions to rulings of the trial court. (Cal. Code Civ. Proc. § 647 [Stats. 1963, ch. 99 § 1].) The cited statutes, none of which are drawn into question in this petition, are lengthy and are set out in Appendix D as pertinent.

V.

STATEMENT OF THE CASE

A. Material Facts.

Respondent brought this action to recover damages for personal injuries sustained by him while employed at petitioner's yard at Klamath Falls, Oregon. On the day of the accident, respondent was a member of a yard crew whose duties included switching railway cars among various tracks. On two separate occasions that day, respondent was

required to secure two particular railway cars at a certain point on a slightly inclined track. The method used to secure the cars, which had been in use for many years in the Klamath Falls yard and remains in use, was to "chock" the wheels. Chocking is accomplished by placing a two by ten piece of wood under one wheel. Respondent testified that one chock, if properly placed, ordinarily is sufficient to secure two railway cars. Respondent also testified that he successfully secured the two particular railway cars by this method when first required to do so. For reasons not material here, the two cars were later removed from the track by a locomotive and then returned to precisely the same location, where respondent was required to chock them a second time. Respondent attempted to do so by means of a chock which, he testified, was in good condition. On this occasion, however, the cars jumped the chock and began to roll. Respondent sustained an injury to his foot when he boarded one of the cars and attempted to stop them.

Petitioner contended at trial and on appeal that the evidence summarized above required submission of the issue of contributory negligence to the jury. That evidence showed that the method of chocking employed by respondent had long been in successful use; that one chock, if properly placed, ordinarily is sufficient to secure two railroad cars; that respondent, earlier in the day, successfully chocked the two cars responsible for his injury at the precise point from which they later commenced rolling; and that the chock used unsuccessfully by respondent on the second occasion was in good condition. Petitioner contended below, and contends again in this petition, that the foregoing evidence strongly suggests that respondent improperly and negligently chocked the cars on the second occasion and thereby contributed to his own injury.

Petitioner also argued at trial and on appeal that the jury should have been instructed that any award of damages made to respondent would not be subject to federal or state income taxation. Personal injury awards are excepted from federal income taxation. (26 U.S.C. § 104(a)(2).) Similarly, such awards are not taxable in California, where the action was tried, or in Oregon, where respondent resides. (Cal. Rev. & Tax Code § 17138(a)(2); Ore. Rev. Stat. § 316.062.) The described instruction was requested in order to prevent the jury from inflating any award and thus overcompensating the plaintiff on the basis of an erroneous assumption that the award would be taxable.

B. Raising and Determination of the Federal Questions.

The federal questions presented in this petition were first raised in the trial court by means of a request to instruct the jury on the issues of contributory negligence and the non-taxability of the award. This request was made in the manner required by California procedure when petitioner tendered proposed instructions on these issues. These proposed instructions are set forth verbatim in Appendix E.[1] The refusal of the trial judge to give these instructions is noted on their face.[2] Petitioner did not take a specific

1. The proposed instructions are found at pages 251-254 and page 272 of the Clerk's Transcript.

The record in this case has not been transmitted to this Court. Record references are included in the event that a request for transmission is made by the clerk or by respondent pursuant to Supreme Court Rules, rule 21(1). All record references made in this petition, including appendices, are to the Clerk's Transcript ("Cl. Tr.") and the Reporter's Transcript ("Rep. Tr.") of the proceedings in the trial court.

2. The trial court gave the following reason for rejecting petitioner's request that the jury be instructed on contributory negligence: "I think there is no contributory negligence or no evidence from which an inference of contributory negligence is shown." (Rep. Tr. p. 322.) Moreover, the trial court specifically charged the jury as follows: "And you are not to consider the defense of contributory negligence, because there is no evidence to support it." (Rep. Tr. p. 420.)

In rejecting petitioner's proposed instruction concerning the nontaxability of the award, the trial court said only the following: "And I have never given an income tax one." (Rep. Tr. p. 316.)

exception to the trial court's ruling, since a refusal to instruct is deemed automatically excepted to in California practice. (Cal. Code Civ. Proc. § 647 [App. D].) Accordingly, the federal questions presented in this petition were adequately raised and preserved for the purpose of obtaining appellate review.

After a timely notice of appeal was filed (Cl. Tr. 415), the same questions were presented to the Court of Appeal by record and briefs, and were again resolved adversely to petitioner. The court's resolution of the contributory negligence issue is shown at pages 3-7 of its opinion (App. A). The opinion states, as the general rule applicable in F.E.L.A. actions, that the "slightest evidence" of contributory negligence is sufficient to take the matter to the jury. The opinion further states, however, that there was *no evidence* in the case from which the jury could reasonably have inferred that respondent was contributorily negligent. In rejecting petitioner's contention, previously discussed, that the evidence strongly suggested that respondent failed properly to chock the railway cars prior to his injury, the Court of Appeal said the following: "The inference suggested by [petitioner] is mere speculation; it could as well be surmised that the chock supplied by [petitioner] was defective or that the failure of the chock to stop the cars was due to some other cause not connected with negligence on the part of respondent" (App. A, p. 5). As is shown in the record and was pointed out in the petition for rehearing, however, respondent himself testified that the chock used just prior to the accident was in good condition.

The Court of Appeal further stated in its opinion that any error of the trial court in refusing to instruct on contributory negligence would not require reversal (App. A, pp. 5-7). As is set forth in the opinion, two causes of action were involved in this case: one cause of action was under the F.E.L.A., alleging negligence on the part of petitioner, and the other was under the Federal Safety Appliance Act, alleging an inefficient handbrake. Contributory negligence is not a defense to an action brought under the latter act. The Court of Appeal stated that, since the jury rendered a general verdict and petitioner did not request a special verdict, it could not be determined upon which cause of action the jury based its decision. This, the court said, invoked the rule of California procedure that where a general verdict is rendered, the fact that one issue is affected by error will be immaterial where other issues are not affected by error and where the evidence regarding such other issues would support the verdict.

The Court of Appeal further held that it was not error for the trial court to refuse to give an instruction regarding the non-taxability of the award (App. A, pp. 9-11). This conclusion was supported by reference to California cases holding that such an instruction is not required in personal injury actions tried in the state courts. The Court of Appeal also said the following: "Moreover, there is no clear federal rule, even as to cases tried in federal courts. *The United States Supreme Court has not ruled on the question, and the lower federal courts are divided on the matter* (citations)" (App. A, p. 11 (emphasis added)).

VI.

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari for the reason that the Court of Appeal has decided federal questions

of substance in a way not in accord with decisions of the federal courts and for the further reason that such issues have not previously been determined by this Court.[3] (Supreme Court Rules, rule 19(a).)

A. The Court of Appeal Incorrectly Applied the Standard Applicable in an F.E.L.A. Action for Determining Whether the Evidence Requires Submission of the Issue of Contributory Negligence to the Jury.

According to the lower federal courts, the sufficiency of the evidence to take the issue of contributory negligence to the jury in actions brought under the Federal Employers' Liability Act is to be tested by the same standard that is used to test the sufficiency of the plaintiff's evidence on the issues of negligence and proximate cause. (*Page v. St. Louis Southwestern Railway Co.* (5th Cir. 1965) 349 F.2d 820, 823-824; *Ganotis v. New York Central Railroad Co.* (6th Cir. 1965) 342 F. 2d 767, 768; *Mumma v. Reading Co.* (E.D. Pa. 1965) 247 F. Supp. 252, 254.) That standard, which is considerably more liberal than that applicable in common law negligence actions, has been described by this Court as follows: "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought. It does not matter that, from the evidence the jury may also with reason, on grounds of probability, attribute the result to other causes, including the

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3. Petitioner has omitted to raise herein its contention, argued below (see App. A, pp. 7-9), that the trial court committed prejudicial error in admitting certain testimony of an expert which constituted an improper conclusion of law concerning the alleged violation by petitioner of the Federal Safety Appliance Act. Petitioner intends to raise this issue before this Court if certiorari is granted.

employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." (*Rogers v. Missouri P. R. Co.* (1957) 352 U.S. 500, 507 (emphasis added).)

In a variety of cases, this Court has demonstrated its willingness to grant certiorari where necessary to enforce correct application of the quoted standard in F.E.L.A. actions tried in the state courts. (see, e.g., *Gallick v. Baltimore and Ohio Railroad Company* (1963) 372 U.S. 108; *Webb v. Illinois Central Railroad Company* (1957) 352 U.S. 512; *Lavender v. Kurn* (1945) 327 U.S. 645; *Tennant v. Peoria & Pekin Union Railway Co.* (1943) 321 U.S. 29; see also *Pehowic v. Lackawanna Railroad Company* (3rd Cir. 1970) 430 F. 2d 697, 699 fn. 2 [stating that Supreme Court will summarily reverse when *Rogers* standard violated and citing per curiam reversals].) Moreover, this Court has made clear that the jury in an F.E.L.A. action may be permitted to engage in a measure of speculation and conjecture and should not be prevented from determining the case merely because factors other than negligence may have caused the occurrence. (*Webb v. Illinois Central Railroad Co., supra,* 352 U.S. 512, 513 fn. 6; *Lavender v. Kurn, supra,* 327 U.S. 645, 653.)

In the case at bench, respondent sustained injury after he attempted unsuccessfully to secure two railway cars by chocking the wheels. As has been argued previously, the evidence relating to the occurrence gives rise to a clear and reasonable inference that respondent negligently and improperly chocked the cars and thereby contributed to his own injury. Although the evidence supporting this conclu-

sion is largely circumstantial, such evidence is sufficient to take the matter to the jury. (*Rogers v. Missouri P. R. Co., supra,* 352 U.S. 500, 508.) The Court of Appeal fundamentally erred when it held that the suggested inference is too speculative to permit the issue to go to the jury. (App. A, p. 5.)

As has been stated above, various lower courts have concluded that the standard established in *Rogers, supra,* and related cases for testing the sufficiency of the plaintiff's case on negligence and proximate cause is also applicable to the defendant's evidence of contributory negligence. This conclusion is a logical consequence of the comparative negligence system embodied in the F.E.L.A. (see *Page v. St. Louis Southwestern Railway Co., supra,* 349 F. 2d 820, 824.) This Court, however, has never ruled on the matter. Moreover, there is significant confusion among the authorities. At least one state appellate court has held that the common law test of proximate cause, while not applicable to the employee's case on negligence, is applicable where the employer contends that the employee was contributorily negligent. (*Missouri-Kansas-Texas R.R. Co. v. Shelton* (Tex. Civ. App. 1964) 383 S.W. 2d 842, 846, cert. den. 382 U.S. 845.) Since this is a question of substantial importance in the uniform administration of the Federal Employers' Liability Act, this Court should make a clarifying rule concerning the manner and circumstances in which the issue of contributory negligence should be submitted to the jury under the Act.

As has been stated previously, the Court of Appeal indicated in its opinion that any error of the trial court in refusing to instruct on contributory negligence would have been immaterial. The opinion refers to the rule of California procedure giving effect to general verdicts in cases

where more than one count or issue exists and not all are affected by error. Petitioner contends that such a resolution of the matter of prejudice is illegitimate, since it results in the denial of petitioner's right to a jury trial on all issues in the case. The right to a jury trial is a right conferred by the Federal Employers' Liability Act and it cannot be defeated by local forms of practice. (*Brown v. Western Railway of Alabama, supra,* 338 U.S. 294, 296; *Bailey v. Central Vermont Railway Inc.* (1942) 319 U.S. 350, 354.) This doctrine is reinforced in the present case by the fact that the rule here in issue has been denounced as "unbelievable" for the reason, among others, that it sanctions the rendition of illegal verdicts. (1 Stanbury, *California Trial and Appellate Practice* (1958) § 622, pp. 681-685.)

B. The Decision Below Incorrectly Holds That, in an F.E.L.A. Action, the Jury Need Not Be Instructed as to the Non-Taxability of the Award.

The Court of Appeal applied the California rule that, in a personal injury action, the jury need not be instructed that any award of damages to the plaintiff will be non-taxable. In so holding, the Court of Appeal relied in large measure upon the fact that no clear federal rule exists concerning the defendant's right to such an instruction in an action brought under the Federal Employers' Liability Act.

In *Burlington Northern, Inc. v. Boxberger* (1975) 529 F. 2d 284, the U.S. Court of Appeals for the Ninth Circuit held that an income tax instruction of the nature here at issue, at least where appropriately requested, must be given in a personal injury action brought under the F.E.L.A. (Id. at 295-298.) A similar holding was made by the Third Circuit in an action for personal injuries brought by a longshoreman. (*Domeracki v. Humble Oil & Refining Co.* (1971)

443 F. 2d 1245, cert. den. 404 U.S. 883.) In other circuits, however, the refusal of a trial judge to give an instruction of the described nature has been upheld. (*Nichols v. Marshall* (10th Cir. 1973) 486 F. 2d 791 [diversity action]; *Greco v. Seaboard Coast Line Railroad Company* (5th Cir. 1972) 464 F. 2d 496, cert. den. 410 U.S. 990 [F.E.L.A. action]; *McWeeney v. New York, New Haven and Hartford Railroad Company* (2d Cir. 1960) 282 F. 2d 34, 39, cert. den. 364 U.S. 870 [F.E.L.A. action]; *Payne v. Baltimore and Ohio Railroad Company* (6th Cir. 1962) 309 F. 2d 546 [F.E.L.A. action].) The Eighth Circuit has expressly declined to rule on the issue. (*Rouse v. Chicago Rock Island and Pacific Railroad Company* (8th Cir. 1973) 474 F. 2d 1180 [F.E.L.A. action]; *Raycraft v. Duluth, Missabe and Iron Range Railway Company* (8th Cir. 1973) 472 F.2d 27 [court stated, in an F.E.L.A. action, that "[t]he question is more properly left open for future consideration and perhaps for *en banc* determination by the entire Court."].) Accordingly, the decisions of the federal circuits are in conflict on this issue.

The reason for informing juries of the non-taxability of awards, as described by *Boxberger* and *Domeracki* courts, is that contemporary juries are "tax conscious" and therefore are likely to inflate damage awards in order to compensate the plaintiff for the presumed effect of income taxation. That this may have occurred in the case at bench is suggested by the fact that the award ($460,575.13) is significantly out of proportion to respondent's impaired earning capacity and other loss as established by the evidence.

This issue is of substantial importance in the uniform administration of the Federal Employers' Liability Act. Since different rules prevail among the lower federal courts, inconsistency in the size of damage awards probably

exists. Moreover, confusion exists in the Ninth Circuit, where some state trial courts apparently follow the rule of *Boxberger, supra,* and others do not. In order to avoid such confusion and consequent forum-shopping among the federal and state trial courts, this Court should establish a uniform federal rule requiring that juries be informed of the non-taxability of personal injury awards and should make such a rule applicable in all actions brought under the Federal Employers' Liability Act.

VII.

CONCLUSION

For the reasons presented above, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal, First Appellate District.

B. CLYDE HUTCHINSON
Attorney for Petitioner
Southern Pacific
Transportation Company

(Appendices Follow)

Appendix A

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

In the Court of Appeal of the State of California
First Appellate District, Division Four

1/Civil 38036
(Superior Court No. 654557)

Ronald Dean Johnson,
Plaintiff and Respondent,

vs.

Southern Pacific Transportation Company, a corporation,
Defendant and Appellant.

Southern Pacific Transportation Company appeals from a judgment rendered on a jury verdict which awarded $460,578.13 to respondent Ronald Dean Johnson on causes of action under the Federal Employers' Liability Act (45 U.S.C., § 51 et seq.) and the Federal Safety Appliance Act (45 U.S.C., § 11).

Respondent was injured while working in appellant's Klamath Falls, Oregon, yard. Respondent was a member of a yard crew of four men whose duties were to switch railroad cars among various repair tracks. Respondent's specific job was that of "fieldman," with the responsibility to guide the cars in outlying areas of the track complex according to directions from the foreman. On the day of the accident, respondent had a "switch list," identifying the location of various railroad cars and giving directions for their placement by the crew. The crew's main task was to transfer several repaired cars from one to another track

and thereafter to place on the repair track certain additional railroad cars which needed work.

During the course of these operations, respondent had under his charge a 150,000-pound bulkhead flatcar and a railroad boxcar which were coupled together on a slightly inclined track. Respondent placed a chock under the wheels of the flatcar, but the car rolled over the chock and continued to move. Respondent attempted to place chocks two more times but the cars kept rolling. Respondent therefore boarded the bulkhead flatcar in order to brake it and thus prevent the flatcar and boxcar from colliding with other railroad cars which were standing on the track. This action conformed to appellant's rules which required employees to attempt to protect appellant's property.

The bulkhead flatcar, as the name implies, was provided with a bulkhead approximately 8 feet high at each end perpendicular to the bed of the car. The brakes were designed to be actuated by a shaft at one end of the car, perpendicular to the bed, approximately 4 feet tall with a horizontal wheel mounted on top of the shaft. The brakes are tightened by turning the wheel in a clockwise direction.

Respondent placed his left foot inside the bulkhead on a ledge 2 inches in width, and his right foot on the bulkhead sill. No footing more secure than that selected by respondent was available. Normally it is necessary to use two hands to operate this type of brake.

Respondent moved the wheel clockwise in an attempt to apply the brake, but the wheel moved only half a turn and then stuck. While respondent was struggling to move the brake, it suddenly came free and spun around, throwing him off balance. Respondent fell down between the two cars, and his foot was crushed. Permanent disability and continuing severe pain resulted from the injury.

Appellant contends that the trial court erred in refusing to submit the issue of respondent's contributory negligence to the jury.

"A railroad has a non-delegable duty to provide its employees with a reasonably safe place to work, Shenker v. Baltimore and O. R. Co., 374 U.S. 1 [1963]. Under the [Federal Employers' Liability] Act, an employer is liable if the injury was caused in whole or in part by its negligence." (*Pehowic v. Erie Lackawanna Railroad Co.* (3d Cir. 1970) 430 F.2d 697, 699.) Contributory negligence is not a defense under the F.E.L.A. but is considered in diminution of damages (45 U.S.C., § 53; *Rogers v. Missouri Pacific R. Co.* (1957) 352 U.S. 500, 505, fn. 9; *Tiller v. Atlantic Coast Line Railroad Co.* (1943) 318 U.S. 54; *Patterson v. Norfolk and Western Railway Co.* (6th Cir. 1973) 489 F.2d 303, 306; *Ganotis v. New York Central Railroad Co.* (6th Cir. 1965) 342 F.2d 767, 768).

Appellant had the burden of proof on the issue of contributory negligence (see *Dixon v. Penn. Central Co.* (1973) 481 F.2d 833, 837; *Mumma v. Reading Co.* (E.D.Pa. 1965) 247 F.Supp. 252, 254). But the sufficiency of the evidence to take the issue of contributory negligence to the jury is to be tested by the same liberal standards that are used to test the sufficiency of plaintiff's evidence on the issues of negligence and proximate cause. (*Page v. St. Louis Southwestern Railway Co.* (5th Cir. 1965) 349 F.2d 820, 824; *Ganotis v. New York Central Railroad Co., supra,* 342 F.2d 767, 768-769; *Mumma v. Reading Co., supra,* 247 F.Supp. 252, 254; but see *Missouri-Kansas-Texas R. R. Co. v. Shelton* (Tex. 1964) 383 S.W.2d 842, 846, cert. den. 382 U.S. 845.)

The slightest evidence of negligence or causation is sufficient to take the case to the jury under the F.E.L.A.:

Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or *in part*" to its negligence. (Emphasis added.)

(*Rogers v. Missouri Pacific R. Co., supra,* 352 U.S. at pp. 506-507; see *Metcalfe v. Atchison, T. & S.F. Ry. Co.* (1974) 491 F.2d 892, 895, 897; *Pehowic v. Erie Lackawanna Railroad Co., supra,* 430 F.2d 697, 699; *Colorado and Southern Railway Co. v. Lombardi* (Col. 1965) 400 P.2d 428, 430; *Seaboard Coast Line Railroad Co. v. McDaniel* (Ala. 1975) 321 S.2d 664, 667-668.)

Appellant's major argument in support of its position that the issue of contributory negligence should have been submitted to the jury is that respondent testified that one wooden chock usually would be sufficient to hold two railroad cars. It is argued that the jury could reasonably have inferred from this testimony that the flatcar began rolling because respondent had negligently failed to place the chock properly.

An inference of contributory negligence must be based on more than suspicion, imagination, speculation, supposition, surmise, conjecture or guesswork. (See *Metcalfe v. Atchison, T. & S.F. Ry. Co., supra,* 491 F.2d 892, 896; *Mason v. Mathiasen Tanker Inds., Inc.* (4th Cir. 1962) 298 F.2d 28; see *Mize v. Atchison, T. & S.F. Ry. Co.* (1975) 46 Cal. App.3d 436, 454.) "Contributory negligence, where it applies, is a matter requiring proof by the party relying thereon, unless the testimony of the plaintiff tenders that issue." (*Ballard v. Sacramento Northern Ry. Co.* (1932) 126 Cal.App. 486, 496.) The inference suggested by appellant is mere speculation; it could as well be surmised that the chock supplied by appellant was defective, or that the failure of the chock to stop the cars was due to some other cause not connected with any negligence on the part of respondent.

Moreover, if it had been error to refuse an instruction on contributory negligence, reversal is not required. There were two separate and distinct causes of action involved in this case: one cause of action was under the Federal Employers' Liability Act, alleging negligence on the part of Southern Pacific in failing to provide a reasonably safe place to work (45 U.S.C., § 51), and the other cause of action was under the Federal Safety Appliance Act, alleging an inefficient hand brake (45 U.S.C., § 11). The jury was instructed on both theories and it rendered a general verdict in favor of respondent. Appellant did not ask for special verdicts; thus, the basis of the jury's decision cannot be established.

As stated in *Rather v. City & County of San Francisco* (1947) 81 Cal.App.2d 625, 636, "a general verdict imports findings in favor of the prevailing party on all material issues, and if upon such a verdict one issue alone is sus-

tained by the evidence and is not affected by any error, the want of evidence to sustain the finding on the other issues or any errors committed in regard to them cannot be prejudicial." (Quoting 2 Cal.Jur., at p. 1029; see *Berger v. Southern Pac. Co.* (1956) 144 Cal.App.2d 1, 5-6; *King v. Schumacher* (1939) 32 Cal.App.2d 172, 178-180; *Edgington v. Southern Pac. Co.* (1936) 12 Cal.App.2d 200, 206; *Walton v. Southern Pac. Co.* (1935) 8 Cal.App.2d 290, 305; see also *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673; *Codekas v. Dyna-Lift Co.* (1975) 48 Cal.App.3d 20, 24-25; *Cross v. Ryan* (7th Cir. 1941) 124 F.2d 883, 887.) Here, the evidence would sustain the general verdict on the basis of a violation of the Federal Safety Appliance Act (see *Myers v. Reading Co.* (1947) 331 U.S. 447, 482-485) even if it had been error, as to the F.E.L.A. cause of action, to refuse an instruction on contributory negligence.

Contributory negligence is not a defense to an action for violation of the Federal Safety Appliance Act, and it has no place in such a case. (See 45 U.S.C., § 53; *Myers v. Reading Co., supra; Rogers v. Missouri Pacific R. Co., supra,* 352 U.S. 500, 507, fn. 13; *Metcalfe v. Atchison, T. & S.F. Ry. Co., supra,* 491 F.2d 892, 895; *McCarthy v. Pennsylvania R. Co.* (7th Cir. 1946) 156 F.2d 877, 880; see also *Leet v. Union Pacific R.R. Co.* (1943) 60 Cal.App.2d 814, 818; *Ballard v. Sacramento Northern Ry. Co., supra,* 126 Cal.App. 486, 497; *Feigl v. Terminal Railroad Ass'n of St. Louis* (Ill. 1975) 332 N.E.2d 416, 422.)

The statutory liability which is imposed for a violation of the Federal Safety Appliance Act is not based on a railroad's negligence; it is an absolute duty and the railroad is not excused by a showing of care. (*Myers v. Reading Co., supra,* 331 U.S. at p. 482.)

A railroad subject to the Safety Appliance Acts may be found liable if the jury reasonably can infer from the evidence merely that the hand brake which caused the injuries was on a car which the railroad was then using on its line, in interstate commerce, and that the brake was not an "efficient" hand brake. Furthermore—

> "There are two recognized methods of showing the inefficiency of hand brake equipment. Evidence may be adduced to establish some particular defect, or the same inefficiency may be established by showing a failure to function, when operated with due care, in the normal, natural, and usual manner." *Didinger v. Pennsylvania R. Co.,* 39 F. 2d 798, 799.
>
> "Proof of an actual break or visible defect in a coupling appliance is not a prerequisite to a finding that the statute has been violated. Where a jury finds that there is a violation, it will be sustained, if there is proof that the mechanism failed to work efficiently and properly even though it worked efficiently both before and after the occasion in question. The test in fact is the performance of the appliance. *Philadelphia & R. R. Co. v. Auchenbach,* 3 Cir., 16 F. 2d 550. Efficient means adequate in performance; producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect; incapable; incompetent; inadequate. . . .

(*Myers, supra,* at pp. 482-483; see *Phillips v. Chesapeake and Ohio Ry. Co.* (1973) 475 F.2d 22, 25.) The evidence is sufficient in the present case to sustain the general verdict on the theory of a violation of the Federal Safety Appliance Act, which was submitted to the jury without error.

Appellant contends that the trial court erred as to the cause of action under the Federal Safety Appliance Act in admitting the testimony of James Suetta, a car inspector

for Southern Pacific. Appellant argues that Suetta expressed certain legal and factual conclusions in his testimony which invaded the provinces of the court and jury.

The Federal Safety Appliance Act provides that "All cars must be equipped with . . . efficient hand brakes; . . ." (45 U.S.C., § 11), and the applicable federal regulation relating to flatcars provides that "Each hand brake shall be so located that it can be *safely operated while car is in motion.*" (Code Fed. Regs., tit. 49, pt. 231, § 231.6(a)(3)(i); emphasis added.) Suetta gave his opinion that the hand brakes were not located so as to be capable of safe operation while the car was in motion. The witness stated the factual basis and reasons for that opinion.

In *Beanland v. Chicago, Rock Island & Pacific R.R. Co.* (8th Cir. 1973) 480 F.2d 109, 116, the court stated:

> . . . competent expert testimony is generally admissible in cases involving the operations of a railroad which necessarily involve facts peculiar to such railroading. Such cases represent specific applications of the general rule enunciated in the case of Associated Dry Goods Corp. v. Drake, 394 F.2d 637, 644 (8th Cir. 1968), to-wit:
>
> "It is the general rule that expert testimony is appropriate when the subject of inquiry is one which jurors of normal experience and qualifications as laymen would not be able to decide on a solid basis without the technical assistance of one having unusual knowledge of the subject by reason of skill, experience, or education in the particular field." *See also* Schillie v. Atchison, T. & S. F. Ry., 222 F.2d 810, 815 (8th Cir. 1955).

(See Evid. Code, §§ 801, 805; Fed. Rules of Evid. 701, 702, 704; *Jablonowski v. United States* (E.Dist.Pa. 1964) 230 F. Supp. 740, 743; *Hawkins v. Missouri Pac. R. Co.* (8th Cir. 1951) 188 F.2d 348, 351; *Haines v. Reading Co.* (3d Cir. 1950) 178 F.2d 918; *Detroit T. and I.R. Co. v. Banning* (6th Cir. 1949) 173 F.2d 752, 756; *Atchison, T. & S.F. Ry. Co. v. Simmons* (10th Cir. 1946) 153 F.2d 206, 208-209; see also *Dyas v. Kansas City Southern Ry. Co.* (5th Cir. 1970) 425 F.2d 1073, 1074; *Atlantic Coast Line R. Co. v. Sweat* (5th Cir. 1950) 183 F.2d 27, 28-29.) The trial court did not abuse its discretion in admitting Mr. Suetta's testimony.

Appellant contends that the trial court erred in failing to instruct the jury that any award to respondent would not be subject to income tax. The following instruction was requested by appellant:

> Any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of either the Federal or State Income Tax Law. Should you find that plaintiff is entitled to an award of damages, then you are to follow the instructions already given to you by this court in measuring those damages, and in no event should you either add to or subtract from that award on account of Federal or State Income Taxes.

California and the majority of courts which have considered the subject have held that it is not error for the trial court to refuse to give an instruction on the subject of income taxes (*Henninger v. Southern Pac. Co.* (1967) 250 Cal.App.2d 872, 878-880 [F.E.L.A. case]; *Atherley v. MacDonald, Young & Nelson* (1956) 142 Cal.App.2d 575, 589; see also *Plourd v. Southern Pac. Transportation Co.* (Ore. 1973) 513 P.2d 1140, 1147). In *Henninger v. Southern Pac. Co., supra,* the court stated (250 Cal.App.2d at pp. 879-880):

> In the only case to reach our appellate courts on the issue here presented, California has sided with the

majority. (*Atherley v. MacDonald, Young & Nelson,* 142 Cal.App.2d 575, 589 [298 P.2d 700].) In *Atherley* this court held that it was not error to refuse to give an instruction to the effect that an award of damages in a personal injury case is not subject to federal or state income taxes. In its opinion the court pointed out that the jury had been instructed on the subject of damages and ". . . was told that it could award compensatory damages only, that is, those damages which would fairly compensate plaintiff for his pecuniary loss. The items of recoverable damage were itemized. The court specifically directed that 'speculative,' or 'conjectural,' or 'remote' damages could not be recovered." Our case is similar. The various elements of special damages were described by the court in its instructions, including damages for medical treatment, hospitalization and attendance, as well as lost earnings and lost earning power. General damages for pain and suffering were also mentioned. The court specifically instructed the jury to award compensatory damages only. No mention was made of taxes of any kind or nature and, if the jury followed the court's instructions as we must presume they did, the award includes nothing to compensate respondent for any supposed loss because of income taxes, but on the contrary, includes only such items of damage as the court described in detail in its instructions. As will later appear, the award itself is well within the range of respondent's evidence.

The F.E.L.A. creates federal rights protected by federal law and as to the propriety of jury instructions defining the cause of action and the measure of damages, federal decisions are controlling (*Dugas v. Kansas City Southern Ry. Lines* (5th Cir. 1973) 473 F.2d 821, 826-827, cert. den. 414 U.S. 823). But the requested instruction does not affect either the definition of a cause of action under the F.E.L.A.

or the measure of damages; it is a matter of general advice which may be thought useful for the purpose of heading off improper speculation on the taxability of a verdict. The giving of such an instruction by a state court is not a requirement of federal law. Moreover, there is no clear federal rule, even as to cases tried in federal courts. The United States Supreme Court has not ruled on the question, and the lower federal courts are divided on the matter (see *Burlington Northern, Inc. v. Boxberger* (9th Cir. 1975) 529 F.2d 284, 296-297; *Rouse v. Chicago, Rock Island & Pacific R.R. Co.* (8th Cir. 1973) 474 F.2d 1180, 1183). It was not error to refuse the requested instruction.

Appellant's final contention is that the trial court erred in excluding evidence of alternate employment opportunities. Appellant contends that the excluded evidence would have shown that respondent had not taken reasonable steps to mitigate his damages.

An injured claimant is required to make a reasonable effort to mitigate his damages; this includes a duty to seek reasonable alternative employment which he is capable of performing. (*McGinley v. United States* (1971) 329 F.Supp. 62, 66.) In the present case, respondent secured employment as a janitor in April 1973, apparently as soon as he was physically able to perform such work. Respondent was still employed as a janitor at the time of trial, and made no claim that he would be totally unemployable in the future.

Appellant offered to prove that respondent had turned down other employment opportunities offered him by appellant. The offer of proof failed to establish, however, any firm or specific job offer on its part to respondent. In fact, it did not even show that it had employment available and was willing to employ respondent. It was not error to

reject this speculative and insubstantial offer of proof. (See generally, *Zimmerman v. Montour R.R. Co.* (W.Dist. Pa. 1961) 191 F.Supp. 433, 434.)

The judgment is affirmed.

Christian, J.

We concur:

Caldecott, P. J.

Rattigan, J.

Filed, January 27, 1977
Clifford C. Porter, Clerk

Appendix B

Court of Appeal of the State of California
in and for the
First Appellate District

Division Four

No. 38036

Ronald Dean Johnson,
Plaintiff and Respondent,

vs.

Southern Pacific Transportation Company,
Defendant and Appellant.

BY THE COURT:

The petition for rehearing filed in the above entitled case is hereby denied.

Dated February 18, 1977

Filed February 18, 1977
Clifford C. Porter, Clerk

Caldecott P.J.

Appendix C

ORDER DENYING HEARING AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 4, Civil No. 38036

In the Supreme Court of the State of California
In Bank

Johnson

v.

Southern Pacific Transportation Company, etc.

Appellant's petition for hearing DENIED.

Tobriner
Acting Chief Justice

Filed, March 24, 1977
G. E. Bishel, Clerk

Appendix D

STATUTES INVOLVED

45 U.S.C. § 51 provides:

"Every common carrier by railroad while engaging in commerce between any of the several States of Territories or between any of the States and Territories, or between the District of Columbia and any of the States of Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

45 U.S.C. § 53 provides:

"In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the

fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

45 U.S.C. § 11 provides:

"It shall be unlawful for any common carrier subject to the provisions of sections 11 to 16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: *Provided,* That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose."

26 U.S.C. § 104 provides, in pertinent part:

"(a) In general.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

. . . (2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness; . . ."

Oregon Revised Statutes, § 316.062 provides:

"The entire taxable income of a resident of this state is his federal taxable income as defined in the laws of the United States, with the modifications, additions and subtractions provided in this chapter."

California Revenue and Taxation Code, § 17138 provides, in pertinent part:

"(a) Except in the case of amount attributable to (and not in excess of) deductions allowed under Sections 17253 to 17258 inclusive (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

. . . (2) The amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness; . . ."

California Code of Civil Procedure § 647 provides, in pertinent part:

"All of the following are deemed excepted to: . . . refusing to give an instruction . . ."

Appendix E

PETITIONER'S PROPOSED JURY INSTRUCTIONS

DEFENSE INSTRUCTION NO. 12

BAJI 11.19

FELA—DEFINITION OF CONTRIBUTORY NEGLIGENCE

Contributory negligence is negligence on the part of a plaintiff which combining with the negligence of a defendant, contributes as a proximate cause in bringing about the injury.

GIVEN ..... s/Lawrence S. Mana
GIVEN AS MODIFIED ..... [Judge]
REFUSED .....✓..... [Cl. Tr. 251]

DEFENSE INSTRUCTION NO. 13

BAJI 11.21

FELA—EFFECT OF CONTRIBUTORY NEGLIGENCE

Contributory negligence, if any, on the part of the plaintiff does not bar a recovery by plaintiff against the defendant Southern Pacific Transportation Company, but the total amount of damages to which the plaintiff would otherwise be entitled against that defendant shall be reduced by you in proportion to the amount of negligence attributable to the plaintiff.

GIVEN ..... s/Lawrence S. Mana
GIVEN AS MODIFIED ..... [Judge]
REFUSED .....✓..... [Cl. Tr. 252]

DEFENSE INSTRUCTION NO. 14

BAJI 11.22

FELA—DIMINUTION OF DAMAGES BECAUSE OF CONTRIBUTORY NEGLIGENCE

Thus, if you find that plaintiff's injury was proximately caused by a combination of contributory negligence of the plaintiff and negligence of the defendant employer, you shall determine the amount of damages to be awarded by you as follows:

First: Determine the total amount of damages to which plaintiff would be entitled under the court's instructions if plaintiff had not been guilty of contributory negligence;

Second: Determine what percentage of the total combined negligence of defendant employer and plaintiff which proximately caused the injury consisted of the plaintiff's negligence; and

Third: Then reduce the total amount of plaintiff's damages by that percentage.

GIVEN ..... s/Lawrence S. Mana
GIVEN AS MODIFIED ..... [Judge]
REFUSED .....✓..... [Cl. Tr. 253]

DEFENSE INSTRUCTION NO. 15

BAJI 11.23

FELA—METHOD TO DIMINISH DAMAGES BECAUSE OF CONTRIBUTORY NEGLIGENCE

For the purpose only of illustrating how to apply the law that requires a proportional reduction of damages in the event of a finding that both the defendant and the plaintiff were guilty of negligence which contributed as a proximate cause to plaintiff's injury, let us assume that a jury in a case similar to this one has made such findings.

Its next step would be to determine that amount of damages to which the plaintiff would be entitled under the court's instructions, if the factor of contributory negligence were not present and the other necessary elements of liability were present. Let us call that amount "X dollars".

The jury next would be required to view as a combined effect the negligence of the defendant and the negligence of the plaintiff which were proximate causes of the injury. Then, with that combined negligence in mind, the jury would determine what portion of it, in fraction or percentage, consisted of plaintiff's own conduct.

If, in the jury's judgment, one-half of such combined negligence was plaintiff's then it would award plaintiff only half of X dollars. If two-thirds of such negligence was plaintiff's, then the jury would award plaintiff only one-third of X dollars. If one-third of such negligence was plaintiff's, then the jury would award plaintiff two-thirds of X dollars.

You will bear in mind that in giving you this illustration, to be considered only in the event that your findings would make it appropriate I do not mean to convey any sugges-

tion whatsoever as to what your verdict should be, whether or the plaintiff or the defendant, or, if for the plaintiff, in what amount.

GIVEN ..... s/Lawrence S. Mana
GIVEN AS MODIFIED ..... [Judge]
REFUSED .....✓..... [Cl. Tr. 254]

DEFENDANT'S INSTRUCTION 31

Any award made to the plaintiff in this case, if any is made, is not income to the plaintiff within the meaning of either the Federal or State Income Tax Law. Should you find that plaintiff is entitled to an award of damages, then you are to follow the instructions already given to you by this court in measuring those damages, and in no event should you either add to or subtract from that award on account of Federal or State Income Tax.

Internal Revenue Code, § 104, (1954)
Revenue & Taxation Code, § 17138
Domeracki v. Humble Oil & Refining Co. 443 F. 2d 1245, 1248-1249 (3d Cir. 1971), *Cert. Denied,* 404 U.S. 883 (1972)
Anderson v. United Airlines, Inc. 183 F. Supp. 97 (S.D. Cal. 1960)
Towli v. Ford Motor Co., 30 App. Div. 2d 319, 292 N.Y.S. 2d 8
Adams v. Deur, 173 N.W. 2d 100
Stager v. Florida East Coast Rwy. Co., 163 So. 2d 15, 18 (1963) [F.E.L.A. Case]
Porier v. Sherman, 129 So. 2d 439 (Fla. 1961)
Brooks v. U.S., 273 F.S. 619, 629
2 Witkin, *Summary of California Law,* § 408, p. 1612

s/Lawrence S. Mana

.....
Judge

GIVEN .....
REFUSED .....✓.....
MODIFIED ..... [Cl. Tr. 272]

CERTIFICATE OF SERVICE

I certify that I am a member of the bar of the Supreme Court of the United States; that I am counsel in this matter for petitioner Southern Pacific Transportation Company; and that the names and post office addresses of counsel of record for respondent are as follows:

Leo M. O'Connor
O'Connor, Sevey & Gessford
629 J Street
Sacramento, California 95814

Leonard Sacks
15910 Ventura Boulevard
Suite 1833
Encino, California 91436

I further certify that on this 16th day of June, 1977, I served three copies of the foregoing petition for certiorari upon the first-named counsel for respondent by enclosing them in a sealed envelope and depositing that envelope in a United States mail box in San Francisco, California, with first class postage thereon prepaid and addressed to said counsel as set forth above; and that on the same date I served three copies of the foregoing petition for certiorari upon the second-named counsel for respondent by enclosing them in a sealed envelope and depositing that envelope in a United States mail box in San Francisco, California, with air mail postage thereon prepaid and addressed to said counsel as set forth above. I further certify that all ~~persons~~ parties required to be served have been served.

B. CLYDE HUTCHINSON
Attorney for Petitioner Southern Pacific Transportation Company

IN THE

Supreme Court of the United States

October Term, 1977
No. 76-1797

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Corporation,

Petitioner,

vs.

RONALD DEAN JOHNSON,

Respondent.

Brief of Plaintiff-Respondent Ronald Dean Johnson in Opposition to Writ of Certiorari.

O'CONNOR, SEVEY & GESSFORD,
629 J Street,
Sacramento, Calif. 95806,
(916) 444-5886,

and

LEONARD SACKS,
15910 Ventura Boulevard, Suite 1833,
Encino, Calif. 91436,
(213) 990-1105,

Attorneys for Plaintiff-Respondent, Ronald Dean Johnson.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

Cases Page

IN THE

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Respondent.

Brief of Plaintiff-Respondent Ronald Dean Johnson in Opposition to Writ of Certiorari.

Plaintiff-respondent Ronald Dean Johnson respectfully responds to the Petition of Petitioner for a Writ of Certiorari as follows:

I
OPINION BELOW.

Petitioner's statement of the foregoing (Petition at p. 2) is not disputed.

II
JURISDICTION.

Respondent submits, as will be hereinafter demonstrated in detail, that petitioner's statement that its petition presents federal questions "of substantial importance in the correct and uniform administration of

the Federal Employers' Liability Act" (Petition at p. 3) is wholly false. The so-called questions petitioner professes to raise are not presented in this case (see III, *infra*), are not of any importance and do not involve any question of uniformity.

III

QUESTIONS PRESENTED.

A. The first alleged "question" presented by the subject petition is, in reality, as follows: where, as here, the evidence establishes that plaintiff's injuries were caused by defendant's violations of the provisions of the Federal Safety Appliances Act and of Regulations promulgated pursuant thereto, is the question of the presence or absence of evidence of contributory negligence on the part of plaintiff of any materiality? (See Opinion of the California Court of Appeal, annexed as Appendix A to the Petition, at pp. 5-7). The application of the standard for determining whether the facts disclose an issue of contributory negligence, which petitioner professes to state as the question (Petition at p. 3), is not a material question in this case and cannot be considered as meriting the attention of any appellate court, much less this Court.

B. The second alleged question presented is whether the Trial Court's refusal, in accordance with State law and practice, to give a redundant and superfluous instruction with respect to the non-taxability of awards requires that a judgment be reversed. The question is *not,* as petitioner professes (Petition at pp. 3-4), whether the instruction on non-taxability should be given. It is, rather, if, regardless of whether or not such an instruction should be given, the refusal to give it constitutes grounds for overturning this judgment

(and numerous other judgments rendered in the California Courts in FELA and Jones Act cases in which the instruction was not given, in reliance on hitherto well-settled authority. See VII B, *infra*). While there may be a division on the subject of whether there should be a *prospective* rule requiring the instruction to be given in future cases, *the authorities are uniform* that the refusal to give it is harmless and innocuous and does not constitute grounds for reversal (Point VII B, *infra*).

IV

STATUTES INVOLVED.

Petitioner has omitted to advise this Court that apart from the statutes petitioner has set forth which it claims are involved (Petition at p. 4), there is also involved herein a Regulation contained in §231.6(a)(3)(i) of Part 231 of Title 49 of the Code of Federal Regulations, which was issued pursuant to 45 U.S.C. §12. The text of said Regulation and of said statute is set forth in Appendix I.

V

APPLICATION FOR DAMAGES FOR DELAY UNDER RULE 56(4).

Plaintiff-respondent suffered the crippling and disabling injuries which are the subject of this case on October 8, 1971 [R.T. 119, 158]. His action was tried in the Superior Court of the County of San Francisco, State of California. Verdict in the sum of $460,575.13 was rendered on January 22, 1975 [Cl. Tr. 32, 343]. Petitioner moved for a new trial on February 13, 1975 [Cl. Tr. 345], and on March

28, 1975, the Trial Court denied said motion [Cl. Tr. 411].

Petitioner then filed a Notice of Appeal, and filed its Opening Brief to the California Court of Appeal, First Appellate District, Division Four, on or about March 24, 1976, fourteen months after the verdict was rendered. After Respondent's Brief was filed, petitioner filed its Reply Brief on or about November 19, 1976, almost two years after the verdict was rendered.

The California Court of Appeal filed its unamimous opinion affirming the judgment on January 27, 1977 (Appendix A, annexed to petitioner's petition, at p. 12). Petitioner petitioned for a rehearing, which was denied on February 18, 1977 (Appendix B, annexed to petition). Petitioner petitioned the California Supreme Court for a hearing, which was unanimously denied *on March 24, 1977* (Appendix C, annexed to petition).

On March 31, 1977, petitioner moved in the California Court of Appeal to stay issuance of the remittitur *for a period of sixty days* (Appendix II, annexed hereto, at p. 3, lines 16-17) in order to further postpone payment of the subject judgment, using the pretext of a proposed petition to this Court as the alleged reason for seeking such stay. On April 26, 1977, the Court of Appeal denied the motion (see Appendix III, annexed hereto).

On April 27, 1977, petitioner applied to Associate Justice Rehnquist for a stay of remittitur and stay of execution of judgment, *representing that it would file a petition for Writ of Certiorari to this Court within thirty days* after the stay request was granted

(see Appendix IV at p. 6, 7th and 8th lines). On April 28, 1977, Mr. Justice Rehnquist denied the application for a stay (see Appendix V).

On May 3, 1977, the Court of Appeal issued its remittitur, permitting respondent to execute on the judgment.

Petitioner thereafter again applied for a stay, this time to the Trial Court, the Superior Court of the County of San Francisco. Said Court indicated to counsel that it would grant said stay, and thereafter issued an order, pursuant to stipulation of the parties. A copy of this order is annexed hereto as Appendix VI. Pursuant to this order, petitioner was permitted to retain for itself, and withhold from respondent, the major portion of the subject judgment.

Although petitioner had already fully briefed the issues in this case in briefs before the California Trial Court, Court of Appeal and Supreme Court; although petitioner represented in the above-referred to documents (Appendices II and IV) that it would file its petition for a writ to this Court *by May of this year;* and although petitioner's petition is but fourteen pages in length, contains nothing new, is largely a rehash of the arguments it urged in the California Courts and could not possibly have taken more than a few days to prepare, petitioner did not file its instant petition *until June 16, 1977,* within one week of the final date permitted by the Rules.[1] Our understanding is that had petitioner complied with its prior representations to the California Court of Appeal and to Justice Rehnquist, and filed its petition within the time originally represented, said petition could have been heard

[1]We did not receive copies thereof until June 18, 1977.

and disposed of in June, 1977. By artfully delaying until the last possible moment, however, petitioner has managed to postpone consideration of its petition until October—a delay of some four months for no reason at all, except a purpose on the part of petitioner to arrogate to itself the use of the moneys for this period, and to withhold said moneys from respondent as long as possible.

Rule 56, subdivision 4 of the Rules of this Court, states:

> "Where a petition for writ of certiorari has been filed, and there appears to be no ground for granting such a writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay."

Under California law, the interest on unpaid judgments is 7% (4 Witkin, "California Procedure" [2d ed.] "Judgment", §§136-137, pp. 3284-3285). The current interest rate available to petitioner and, indeed, even to respondent, is appreciably greater than that. We therefore respectfully submit that this Court should award respondent damages for his delay, and should order a reference to determine the amount thereof.

For, as we shall now show, there is no ground whatever for the granting of the instant petition.

VI
STATEMENT OF THE CASE.

On the date of the accident, October 8, 1971, plaintiff was working as a field man for defendant [R.T. 119, 158]. As such, he was part of a switching crew, whose function was to place various railroad cars on various tracks [R.T. 157, 158, 160-161].

During the course of switching operations that day, plaintiff had in his charge a 150,000 pound bulkhead flatcar [R.T. 121, 123, 200] and a railroad boxcar, which was coupled to the flatcar [R.T. 120, 121, 122, 126, 165, 177, 180]. These two cars were on an incline, and petitioner's working procedure was to have these cars stopped from rolling by placing "chocks," *i.e.*, 8 to 10 inch long 2 by 2's, under the train wheels [R.T. 120, 121, 162-163, 181-182, 200].

Plaintiff attempted to hold the cars by this method, but the cars splintered the chocks, rolled over them and "took off down the track" [R.T. 121. See also R.T. 120, 181, 200]. Plaintiff then twice more attempted to stop the cars with the chocks, but the same thing happened and the cars kept rolling [R.T. 121, 181].

Plaintiff therefore boarded the bulkhead flatcar, in order to brake it, and thus prevent the flatcar and boxcar from rolling down the track and colliding with other railroad cars stationed on the track [R.T. 120, 121, 122, 124, 126, 127, 165, 182]. This action was dictated by respondent's rules which required employees to attempt to protect respondent's property, and to stop cars going downgrade [R.T. 120, 201].

The bulkhead flatcar was flat, with two ends approximately 8 to 10 feet high [R.T. 124]. The brake was a staff brake, consisting of a post in a vertical position and a wheel on top in a horizontal position [R.T. 124, 174, 280]. Plaintiff placed his left foot inside the bulkhead on a ledge 2 inches in width and his right foot on the bulkhead sill [R.T. 127, 142, 183]. There was no brake platform or other means afforded to enable plaintiff to have secure footing [R.T. 124-125, 126, 127, 135, 142].

Once on the flatcar, plaintiff moved the wheel clockwise to attempt to apply the brake [R.T. 127, 143, 183]. However, the wheel moved only half a turn and then stuck [R.T. 127, 142, 183, 185, 186]. Plaintiff then moved the wheel counterclockwise a little bit, and then clockwise again, to try to loosen the wheel and complete the braking operation [R.T. 127, 128, 143, 183-184, 185, 186, 201, 202]. He repeated these movements back and forth several times, without success [R.T. 128, 143, 183-184, 185, 186, 202]. Then, while he was again exerting pressure and struggling to move the brake, it suddenly came loose and spun around, throwing him off balance [R.T. 128, 143, 144, 299-300]. He fell down between the cars and suffered the crippling injuries which are the subject of this lawsuit [R.T. 144, 145].

VII

THE INSTANT PETITION IS WITHOUT MERIT.

A.

1. The Evidence Clearly Established Two Separate Violations of the Safety Appliances Act, as to Which Contributory Negligence Is No Defense. Hence, the Question of Whether or Not Evidence of Contributory Negligence Existed Is Immaterial and Furnishes No Basis Whatever for This Court to Grant the Instant Petition.

The Safety Appliances Act requires that all railroad cars "must be equipped with . . . efficient hand brakes." (45 U.S.C. §11). The evidence summarized above demonstrates that the brake involved herein was *not* an efficient hand brake, since it did not operate on application, but rather stuck and then suddenly released [R.T. 143-144, 213-214, 224-225].

Additionally, the above evidence establishes that appellant violated the above-cited Regulation issued pursuant to the Safety Appliances Act. A violation of such a Regulation renders the carrier absolutely liable in the same manner as a violation of the statute itself. See *Urie v. Thompson*, 337 U.S. 163, 191; *Lilly v. Grand Trunk W.R. Co.*, 317 U.S. 481, 488.

Said Regulation required that every hand brake on a flatcar shall be so located "that it can be *safely operated while car is in motion*" (§231.6[a][3][i] of Part 231 to Title 49 of the Code of Federal Regulations, set forth in App. I, *infra* [emphasis added]). The overwhelming evidence established that the brake on the subject flatcar could not be safely operated while said car was in motion, because there was no place on the flatcar where the operator could securely plant his feet while operating the brake [R.T. 209-210, 212, 215, 220, 225, 227]. A violation of the foregoing Regulation promulgated pursuant to the Safety Appliances Act was thus clearly established.

Contributory negligence is, of course, not a defense to either of the foregoing violations of the Safety Appliances Act. 45 U.S.C. §53. Thus, the question of plaintiff's contributory negligence was wholly irrelevant and immaterial to plaintiff's right to recover for the injuries he sustained as a result of said Safety Appliances Act violations.

The only manner in which the alleged issue of plaintiff's purported contributory negligence would be relevant in this case would be if the jury based its verdict *only* on a cause of action not arising under the Safety Appliances Act. If the jury found against petitioner on *either* of the Safety Appliances Act violations, the

question of plaintiff's alleged negligence is irrelevant. It was only if *neither* Safety Appliances Act violation was the basis for the jury's decision that the issue of plaintiff's alleged negligence would even enter into this case. The facts of this case and the evidence emphasized at the trial demonstrate to a certainty that the jury's verdict was based on at least one, and probably both, Safety Appliances Act violations, which were the immediate cause of the accident.

And, in any event, it was incumbent on petitioner to prove otherwise, and to establish that the jury decided this case *only* on a cause of action as to which any alleged contributory negligence would be relevant. This, petitioner wholly failed to do, because it sought to gamble on the verdict, did not request any special verdict, and acquiesced and agreed to the rendition of a general verdict.

California authority makes it clear that where a general verdict is rendered, and one or more of the causes of action proven are unaffected by any error, any alleged or claimed error committed with respect to another cause of action cannot be prejudicial and is immaterial (See Opinion of the California Court of Appeal, App. A, at pp. 5-7, and authorities cited therein). This rule has been uniformly applied to FELA actions. See, *e.g., King v. Schumacher,* 32 Cal.App.2d 172, 178-180, cert. den., 308 U.S. 593; *Walton v. Southern Pac. Co.,* 8 Cal.App.2d 290, 305, cert. den., 296 U.S. 647; *Edgington v. Southern Pac. Co.,* 12 Cal.App.2d 200, 206. It is applicable with even more force herein, since as noted above, the causes of action for the two Safety Appliances Act violations were the major issues in the subject trial, and there was little,

if any, attention given to the other cause of action. Moreover, a litigant is not permitted to gamble on the verdict; such litigant may not omit to take steps to establish the basis of the jury's decision, and then after an adverse verdict is rendered, claim that said verdict was based on a cause of action which was purportedly the subject of some alleged error.

As the California Court said in *Codekas v. Dyna-Lift Co.,* 48 Cal.App.3d 20:

> "*parties should have one chance to have a jury's fact finding pinpointed; this can be accomplished by requesting special verdicts or findings* (Code Civ.Proc., §§624, 625); *a losing party should not be permitted to drag litigation through the appellate courts by turning his back on safeguards afforded by the Legislature; . . . the responsibility for requesting special verdict forms rests with the party who loses the verdict (the appellant).*" 48 Cal.App.3d at pp. 24-25. Emphasis added.

Petitioner has wholly failed to explain its omission to request a special verdict. Although it criticizes the above-quoted California rule (Petition at p. 12), *it does not deny its application,* and it apparently wishes this Court to decree that this rule violates some federal concept (*ibid.*). However, petitioner cites no authority whatever for the proposition that there is *any* federal question, much less a federal question of a magnitude that would concern this Court, from a State rule discouraging gambling on verdicts and requiring that special verdicts be rendered to preserve on appeal a point such as the one petitioner purports to raise here.

2. In Any Event, There Was No Evidence of Contributory Negligence on the Part of Plaintiff.

In attempting to conjure up some contention that uniformity is somehow involved herein, petitioner first contends that there is a conflict as to whether under the FELA the tests of negligence and proximate cause are the same when it is the employee's negligence that is in question as when it is the employer's negligence that is in question (see, *e.g.*, Petition at p. 11). However, the Opinion of the California Court of Appeal demonstrates that said Court applied the test and rule contended for by petitioner. The Court of Appeal said: "the sufficiency of the evidence to take the issue of contributory negligence to the jury is to be tested by the same liberal standards that are used to test the sufficiency of plaintiff's evidence on the issues of negligence and proximate cause." (App. A at p. 3, 3rd paragraph).

Similarly, the Court of Appeal applied the test for the existence of evidence of negligence and causation contended for by petitioner, noting that the "slightest evidence of negligence or causation is sufficient to take the case to the jury under the FELA" (Opinion at p. 3), and then quoting extensively from this Court's decision in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506-507, the decision petitioner urges applies herein (Petition at pp. 9-11). Applying these tests, the Court of Appeal concluded that there was no evidence of any contributory negligence on the part of plaintiff, for the reasons set forth at pages 4-5 of the Opinion.

In view of the foregoing, and in view of the immateriality of this purported issue in any event (subsection

1, *supra*), we do not believe it necessary to enter into a more detailed discussion of the facts involved herein.[2]

B.

Petitioner's Contention With Respect to the "Income Tax" Instruction Is Wholly Without Merit.

There are two separate and distinct questions involved with respect to the effect of income taxes on damages in FELA cases. One question is substantive and its resolution may have an important impact on the size of the damages awarded. The other question is procedural and innocuous and has no effect other than as a redundant and unnecessary cautionary instruction. It is *only* the second question that is involved herein, *and even the cases relied on by petitioner* (Petition at pp. 12-14) *hold that the failure to comply with the rule laid down in said cases with respect to this question does not constitute reversible error.*

The first question, the substantive question, is whether the jury should deduct from a disabled plaintiff's award for loss of earnings and loss of earning capacity that portion of said earnings it may find would not be received by a plaintiff by reason of income taxes. That question thus involves the method

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[2]It should also be noted that, in setting up the alleged facts, petitioner cited no record references, and its statement of the facts contains omissions and misstatements. We shall not burden this Court by detailing these omissions and misstatements, but it should be noted, for example, that the evidence established that the chocks petitioner furnished consisted of two inch by two inch pieces of soft pine, which petitioner intended to be used to hold two railroad cars, one of which alone weighed 150,000 pounds [R.T. 120, 121, 162-163, 200]. To contend that the failure of this piece of flimsy wood to hold such weight furnishes an inference that plaintiff was negligent, is, we submit, a vacuous contention.

by which the jury should compute a plaintiff's damages for these items, *i.e.*, on a "gross" basis or net after taxes. *That question is not involved in this case.*

The second question is whether the jury should be instructed that any award of damages to plaintiff will not be subject to income taxation. This instruction is basically a redundant instruction designed to avoid the remote possibility that the jury will disregard the other instructions given it as to the items of damages to be awarded and will add to the award an amount to compensate for income taxation. The California Courts have uniformly held that it is not error to refuse this instruction. *Henninger v. Southern Pac. Co.*, 250 Cal.App.2d 872; *Atherley v. MacDonald, Young and Nelson*, 142 Cal.App.2d 575. These holdings essentially state that where (as here [R.T. 423-426]) the jury has been specifically instructed as to the specific items of damages which plaintiff could be awarded, and specifically directed that "speculative" or "remote" or "conjectural" damages should not be awarded, there is no necessity to specifically advise the jury with respect to income taxes, or even to mention taxes. See *Henninger, supra*, 250 Cal.App.2d at pp. 879-880; Appendix A annexed to Petition, at pp. 9-10. In reliance on these holdings, the Trial Court herein refused the "tax" instruction. Subsequently, the case of *Burlington Northern Inc. v. Boxberger*, 529 F.2d 284 (9th Cir. 1975) was decided, and petitioner's contention is, in effect, that this case changed the law and requires that *all* pending FELA and Jones Act cases already tried in California which followed the rulings of the *Henninger* and *Atherley* cases must be reversed on appeal.

However, petitioner omits to advise this Court that it has been uniformly held, *even in jurisdictions that require the instruction to be given,* that the failure to give it is *not* reversible error. Thus, in *Boxberger, supra,* the judgment was reversed by reason of the Court's ruling on the first question, the substantive question of whether loss of earnings should be assessed on a "gross" or "net" basis. And in *Domeracki v. Humble Oil & Refining Co.*, 443 F.2d 1245 (3rd Cir. 1971), the other authority primarily relied on by petitioner (Petition at pp. 12-14), the Court did hold that the "income tax" instruction should be given, but it also held that this rule would be applied *only prospectively*. See 443 F.2d 1245, 1252.

And in *Geris v. Burlington Northern, Inc.*, 561 P.2d 174 (Sup. Ct. Ore. 1977), the Oregon Supreme Court, after holding that the "income tax" instruction should be given in future cases, stated as follows:

> "However, *we have been unable to discover any case, state or federal,* in which the trial court has been reversed and a new trial ordered solely on the grounds that the court failed to instruct the jury that any damages awarded would not be treated as income in the year received." 561 P.2d at p. 183. Emphasis added.

See also: *McWeeney v. New York, N.H. & H.R.R. Co.*, 282 F.2d 34 (2d Cir. 1960); *Rouse v. Chicago, Rock Island & P.R. Co.*, 474 F.2d 1180 (8th Cir. 1973); *Dempsey v. Thompson*, 251 S.W.2d 42, 45-46 (Sup. Ct. Mo. 1952).

The reason that the refusal to give the "income tax" instruction is not reversible error is manifest. As the California Court of Appeal said at bar: "the requested instruction does not affect either the definition of a cause of action under the F.E.L.A. or the measure

of damages; it is a matter of general advice which may be thought useful for the purpose of heading off improper speculation on the taxability of a verdict." (Opinion at pp. 10-11). And the instruction is plainly a cautionary instruction of the type that is "usually held to be discretionary with the trial court" (*Geris, supra,* 561 P.2d at p. 183. See also: *McWeeney, supra, Rouse, supra*).

It is therefore plain that petitioner is attempting to consume the time of this Court and to hinder and delay respondent on the basis of the giving of an innocuous, redundant instruction *that petitioner's own authorities hold does not constitute a ground for reversal of the judgment.*[3] Thus, contrary to petitioner's representations to this Court (Petition at p. 13), there is no conflict on this "issue."[4]

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[3]Petitioner makes the bald statement that the award herein is "significantly out of proportion to respondent's" damages (Petition at p. 13) and that this "may have occurred" because the jury compensated the plaintiff for the effect of taxes (*ibid.*). However, petitioner has not set forth any evidence to support these statements and, in fact, the uncontradicted evidence at the trial establishes that plaintiff had sustained an excruciating, painful and disabling permanent injury [*e.g.,* R.T. 32-35, 82-85, 88, 90, 91-95], with a large accompanying monetary loss, a loss which more than amply justified the size of the verdict.

[4]In view of the foregoing, it is unnecessary for us to discuss the fact that the instruction should not be given, in any event, for a number of reasons which have been thoroughly canvassed in the various cases cited in the text. Because of its innocuous nature, we do not believe it is important whether the instruction is given or not, but we cannot conceptually ascertain why the fact that plaintiff is not required to pay income taxes out of the award should be singled out for a special instruction. If this is permitted, may the jury also be told that, for example, plaintiff *is* required to pay attorneys' fees out of the award?

Conclusion.

Petitioner's petition should be denied, and respondent should be awarded reasonable damages for his delay, pursuant to Rule 56, subdivision 4.

Respectfully submitted,

O'CONNOR, SEVEY & GESSFORD,
and
LEONARD SACKS,
Attorneys for Plaintiff-Respondent, Ronald Dean Johnson.

APPENDIX I.

45 U.S.C. §12 provides:

12. Safety appliances, as designated by commission, to be standards of equipment—Modification of standard height of drawbars.—Within six months from the passage of this Act [Apr. 14, 1910] the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this Act [§ 11 of this title] and section four of the Act of March second, eighteen hundred and ninety-three [§ 4 of this title], and shall give notice of such designation to all common carriers subject to the provisions of this Act [§§ 11-16 of this title] by such means as the commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act [§§ 11-16 of this title], unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this Act [§§ 11-16 of this title]: Provided, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which

any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this Act [Apr. 14, 1910]. Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of draw bars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission. (Apr. 14, 1910, c. 160, § 3, 36 Stat. 298.)

Title 49, Part 231 of the Code of Federal Regulations provides:

"§ 231.6 Flat cars.

(Cars with sides 12 inches or less above the floor may be equipped the same as flat cars.)

(a) *Hand brakes*—(1) *Number.* Same as specified for 'Box and other house cars' (see § 231.1(a)(1)).

(2) *Dimensions.* Same as specified for 'Box and other house cars' (see § 231(a)(2)).

(3) *Location.* (i) Each hand brake shall be so located that it can be safely operated while car is in motion.

(ii) The brake shaft shall be located on the end of car to the left of center, or on side of car not more than 36 inches from right-hand end thereof.

(iii) Carriers are not required to change the brakes from right to left side on steel or steel-underframe cars with platform end sills, in service July 1, 1911, except when such appliances are renewed, at which time they must be made to comply with the standards prescribed.

(iv) Carriers are not required to change the location of brake wheels and brake shafts on cars in service July 1, 1911, where the appliances are within 3 inches of the required location, except that when cars undergo regular repairs they must then be made to comply with the standards prescribed.

(4) *Manner of application.* Same as specified for 'Box and other house cars' (see § 231.1(a)(4))."

APPENDIX II.

DUNNE, PHELPS & MILLS
601 California Street
San Francisco, California 94108
Telephone: 415/986-4812

Attorneys for Defendant and Appellant
Southern Pacific Transportation Company

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THE FIRST APPELLATE DISTRICT, DIVISION FOUR

RONALD DEAN JOHNSON, Plaintiff and Respondent, vs. SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation, Defendant and Appellant.	NO. 1/CIV. 38036

MOTION TO STAY ISSUANCE OF REMITTITUR; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF B. CLYDE HUTCHINSON, ESQ.; AND ORDER

Appellant SOUTHERN PACIFIC TRANSPORTATION COMPANY hereby moves the above-entitled Court for an order staying issuance of the remittitur in this cause until the time stated in the attached order. This motion is made on the ground that Appellant intends to submit a petition for a writ of certiorari to the United States Supreme Court in the above-entitled matter. This motion is based on the attached Memorandum of Points and

Authorities and Declaration of B. Clyde Hutchinson, Esq.

Dated: March 31, 1977.

DUNNE, PHELPS & MILLS

By: B. Clyde Hutchinson

B. Clyde Hutchinson
Attorneys for Appellant Southern
Pacific Transportation Company

MEMORANDUM OF POINTS AND AUTHORITIES

A reviewing court, for good cause, may stay the issuance of a remittitur for a reasonable period. (Cal. Rules of Court, Rule 25(c)). It has been held that issuance of a remittitur may be stayed in order that a party, before execution of judgment, may have an opportunity to prepare and file a petition for a writ of certiorari in the United States Supreme Court. (Severns Drilling Co. v. Superior Court (1936) 16 Cal. App. 2d 435); Reynolds v. E. Clemens Horst Co. (1918) 36 Cal. App. 529; see Cont. Ed. Bar, California Civil Appellate Practice, §15.101, p. 544.)

DECLARATION OF B. CLYDE HUTCHINSON, ESQ.

I am an attorney duly admitted to practice before the above-entitled court and a member of the firm of Dunne, Phelps & Mills and as such am attorney for Appellant Southern Pacific Transportation Company in this matter.

This is an appeal from a judgment that awarded $460,587.13 to respondent Ronald Dean Johnson on causes of action under the Federal Employer's Liability Act (45 U.S.C. §51 et seq.) and the Federal Safety

Appliance Act (45 U.S.C. §11 et seq.). The judgment was affirmed by the above-entitled court (per Christian, J.) in an opinion filed on January 27, 1977. Appellant's petition for a hearing in the California Supreme Court was denied on March 24, 1977.

Appellant intends to prepare and submit a petition for a writ of certiorari to the United States Supreme Court. It is believed by the undersigned that, due to certain issues involving the Federal Employer's Liability Act and the Safety Appliance Act to be presented therein, the said petition will be meritorious and will be considered seriously by the Supreme Court.

If the instant motion is granted, Appellant will submit its petition for a writ of certiorari to the United States Supreme Court on or before the sixtieth day thereafter. Execution of the instant judgment during the pendency of the said petition would subject appellant to substantial hardship and to the risk of irreparable harm.

Appellant accordingly requests that issuance of the remittitur be stayed for a period of sixty days, or such other period as the court may direct, and in the event Appellant's petition for a writ of certiorari is submitted at or before the end of that period, until ten days after the U. S. Supreme Court passes upon the said petition. The undersigned will notify the Clerk of the Court of Appeal of the action taken by the U. S. Supreme Court on or before the tenth day after such action is taken.

Respondent will be protected from loss during the period of the stay requested herein, since Appellant has filed an undertaking in the amount of one and one-half times the amount of the judgment pursuant to Code

of Civil Procedure §917.1

Executed on March 31, 1977, at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.

B. Clyde Hutchinson

B. Clyde Hutchinson

ORDER STAYING ISSUANCE OF REMITTITUR

FOR GOOD CAUSE, IT IS ORDERED that issuance of the remittitur in the above-entitled action be and is stayed for a period of sixty days from the date set forth below, and in the event Appellant submits a petition for a writ of certiorari to the U. S. Supreme Court at or before the end of that period, until ten days after the Supreme Court passes on the said petition.

Dated:

Presiding Justice

APPENDIX III.

Court of Appeal of the State of California

COPY

IN AND FOR THE

First Appellate District

Division FOUR

Ronald Dean Johnson,
Plaintiff and Respondent,
vs.
Southern Pacific Transportation Company, etc.,
Defendant and Appellant.

No. 38036

BY THE COURT:

The motion to stay issuance of remittitur is denied.

Dated APR 26 1977

RATTIGAN, J. ACTING P.J.

APPENDIX IV.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner,

vs.

RONALD DEAN JOHNSON,

Respondent

APPLICATION FOR STAY OF REMITTITUR OF CALIFORNIA COURT OF APPEAL AND STAY OF EXECUTION OF JUDGMENT

Appearance: B. Clyde Hutchinson
DUNNE, PHELPS & MILLS
601 California Street
San Francisco, California 94108
Telephone: (415) 986-4812

Attorneys for Petitioner
Southern Pacific
Transportation Company.

To the Honorable William Rehnquist, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Petitioner Southern Pacific Transportation Company (hereinafter "Petitioner") prays that an order will be entered staying issuance of the remittitur of the California Court of Appeal,

First Appellate District, Division Four (hereinafter "the Court of Appeal"), and staying execution and enforcement of the judgment of the Superior Court of the State of California, City and County of San Francisco (hereinafter "the trial court") pending the filing of a petition for certiorari in the above-entitled case and a final determination of the matter by this Court. In support of this application, Petitioner respectfully submits as follows:

1. Respondent Ronald Dean Johnson (hereinafter "Respondent") brought this action against Petitioner under the Federal Employer's Liability Act (45 U.S.C. §51 et seq.) and the Federal Safety Appliance Act (45 U.S.C. §11 et seq.) for injuries allegedly sustained while acting as Petitioner's employee. Pursuant to a jury verdict, the trial court entered judgment for Respondent in the amount of $460,587.13. The judgment was affirmed by the Court of Appeal in an opinion filed on January 27, 1977, a copy of which is attached hereto as "Exhibit A." Petitioner's timely petition for a rehearing was denied by the Court of Appeal on February 18, 1977. Petitioner's timely petition for a hearing in the California Supreme Court was denied on March 24, 1977.

2. On March 31, 1977, Petitioner filed a Motion to Stay Issuance of Remittitur in the Court of Appeal. The ground of the said motion was to permit Petitioner, prior to execution of judgment in the trial court, to prepare and file a petition for certiorari in the United States Supreme Court. In California practice, the remittitur constitutes the final process of the appellate court and issuance of the remittitur causes jurisdiction to be vested in the trial court for enforcement of the judgment or other purposes. (6 Witkin, California Practice (2d ed.) Appeal, §516, 520.) A motion to stay issuance of remittitur is an appropriate means to prevent execution of judgment pending

disposition of a petition for certiorari in the United States Supreme Court. (Severns Drilling Co. v. Superior Court (1936) 16 Cal. App. 2d 435; Reynolds v. E. Clemens Horst Co. (1918) 36 Cal. App. 529.) Nevertheless, Petitioner's Motion to Stay Issuance of Remittitur was denied without opinion by the Court of Appeal on April 26, 1977.

3. The jurisdiction of this court to review this case on petition for certiorari rests upon 28 U.S.C. §1257(3). Jurisdiction to issue the stay requested herein is granted by 28 U.S.C. §2101(f).

4. In determining the appropriateness of a stay of proceedings in a lower court, a Circuit Justice must inquire as to whether any of the matters proposed to be raised in the petition for certiorari are "sufficiently debatable to lead to the belief that at least four members of the Court would vote to grant certiorari" or some form of interim relief. (Edwards v. United States, 76 S. Ct. 1058, 1059 (Opinion of Mr. Justice Harlan as Circuit Justice).) Petitioner submits that there are at least two major issues to be raised in the petition which warrant a stay under this standard:

(a) A principal reason for seeking certiorari in this case is to test the ruling of the Court of Appeal that the trial court did not commit error when it refused to instruct the jury that any award made to respondent would not be subject to income taxation. In Burlington Northern, Inc. v. Boxberger (1975) 529 F 2d 284, the U.S. Court of Appeals for the Ninth Circuit held that such an instruction must be given in personal injury actions brought under the Federal Employer's Liability Act. (Id. at 295-297.) A similar holding was made by the Court of Appeals for the Third Circuit in Domeracki v. Humble Oil & Refining Co. (1971) 443 F 2d 1245, cert. den. 404 U.S. 883. In

other circuits, however, the refusal of a trial judge to give an instruction of the described nature has been upheld. (Nichols v. Marshall (10th Cir. 1973) 486 F. 2d 791; Elston v. Shell Oil Co. (5th Cir. 1973) 481 F. 2d 608; McWeeney v. New York, New Haven & Hartford R.R. (2d Cir. 1966) 282 F. 2d 34, 39, cert. den. 364 U.S. 870; New York Central R.R. Co. v. Delich (6th Cir. 1958) 252 F. 2d 522; see Rouse v. Chicago R. I. & P. R. R. Co. (8th Cir. 1973) 474 F. 2d 1180.) Accordingly, there is a conflict in the circuits on this question. In the case at bench, the absence of a clear federal rule was cited by the Court of Appeal as a reason for applying the California rule that such an instruction is not required in personal injury actions. (Opinion, Exhibit A, p. 11.) This Court should establish a uniform federal rule requiring that juries be informed of the non-taxability of awards and should make such a rule applicable in all actions brought in the state courts under the Federal Employer's Liability Act. In the absence of such a holding by this Court, different rules will continue to prevail among the state and lower federal courts with consequent inconsistency in the amount of jury awards. Moreover, at least in the Ninth Circuit, such a condition might lead to forum-shopping between the federal and state courts in F.E.L.A. actions.

(b) Another reason for seeking certiorari in this case is that the decision of the Court of Appeal is in direct conflict with decisions of this Court and other federal courts concerning the quantum of evidence necessary to require submission of the issue of contributory negligence to the jury in an action brought under the Federal Employer's Liability Act. It has been held that the sufficiency of the evidence to take the issue of contributory negligence to the jury in such actions is to be tested by the same liberal standards that are used to test the

sufficiency of the plaintiff's evidence on the issues of negligence and proximate cause. (Page v. St. Louis Southwestern Railway Co. (5th Cir. 1965) 349 F. 2d. 820, 824; Ganotis v. New York Central Railroad Co. (6th Cir. 1965) 342 F. 2d. 767, 768; Mumma v. Reading Co. (E.D. Pa. 1965) 247 F. Supp. 252, 254.) Moreover, paramount cases involving the F.E.L.A. establish that a very slight degree of evidence is sufficient to take the issue of contributory negligence to the jury. (see, e.g., Gallick v. Baltimore and Ohio Railroad Company (1963) 372 U.S. 108, Webb v. Illinois Central Railroad Company (1957) 352 U.S. 12: Lavender v. Kurn (1945) 327 U.S. 645, Tennant v. Peoria and Pekin Union R. Co. (1943) 321 U.S. 2d.) The ruling of the Court of Appeal on the issue of contributory negligence is in conflict with the standard established by the cited cases. Moreover, since at least one published state decision departs from the described standard and holds that the common law test of proximate cause is applicable to an employee's contributory negligence in a F.E.L.A. action but not to the negligence of the defendant (Missouri-Kansas-Texas R.R. Co. v. Shelton (Tex. Civ. App. 1964) 383 S.W. 2d 842, 846.), this Court should make a clarifying ruling concerning the manner and circumstances in which the issue of contributory negligence should be submitted to the jury in such a case.

6. Petitioner expects that Respondent will apply for a writ of execution in the trial court immediately upon issuance of the remittitur by the Court of Appeals. If such a writ of execution is obtained and the judgment is satisfied, Petitioner will be subjected to a strong risk of irreparable harm. If the judgment is satisfied and this Court thereafter grants the petition for a writ of certiorari and reverses the decision of the Court of Appeal, it will be virtually impossible for Petitioner to obtain repayment of the full amount of the judgment. This prejudicial result will be avoided, however, if the stay requested

herein is granted. Moreover, Respondent will not suffer any damage if such a stay is granted, since Petitioner has filed an undertaking in the trial court in the amount of one and one-half times the amount of the judgment pursuant to California Code of Civil Procedure section 917.1. Further, in order to expedite proceedings in this Court, Petitioner will file its petition for certiorari on or before the 30th day after the stay requested herein is granted. Petitioner will undertake to act sooner if directed to do so by this Court.

WHEREFORE, Petitioner prays that this Court issue an order staying issuance of the remittitur for thirty days, and in the event Petitioner files its petition for certiorari and performs all acts necessary in connection therewith on or before the end of that period, until disposition of said petition by this Court. Further, since Petitioner has been informed by the Clerk of the Court of Appeal that the remittitur may be issued before this Court rules upon the instant application for a stay, Petitioner requests that the order of this Court also provide that, in the event the remittitur is issued before it can be stayed, execution and enforcement of the judgment in the trial court will likewise be stayed.

Dated: April 27, 1977

Respectfully submitted,

DUNNE, PHELPS & MILLS

By: B. CLYDE HUTCHINSON
B. Clyde Hutchinson

Attorneys for Petitioner Southern Pacific Transportation Company

APPENDIX V.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

April 29, 1977

B. Clyde Hutchinson, Esquire
Dunne, Phelps & Mills
601 California Street
San Francisco, California 94108

Re: Southern Pacific Transportation Company
v. Ronald Dean Johnson, A-892

Dear Mr. Hutchinson:

Your application for stay in the above-entitled case has been presented to Mr. Justice Rehnquist, who has endorsed thereon the following:

"Denied
WHR
4/28/77"

Very truly yours,

MICHAEL RODAK, JR., Clerk

By

Peter K. Beck
Assistant Clerk

th

cc: O'Connor, Sevey & Gessford
429 J Street
Sacramento, California 95814

Leonard Sacks, Esquire
15910 Ventura Blvd., Suite 1833
Encino, California 94136

APPENDIX VI.

DUNNE, PHELPS & MILLS
601 California Street
San Francisco, California 94108
Telephone: 415/986-4812

Attorneys for Defendant Southern
Pacific Transportation Company

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

RONALD DEAN JOHNSON,

Plaintiff,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation,

Defendant.

NO. 654 557

MAY 31 1977

ORDER STAYING EXECUTION AND ENFORCEMENT OF JUDGMENT

Ronald Dean Johnson, plaintiff, by his attorneys of record, O'Connor, Sevey & Gessford, and Southern Pacific Transportation Company, defendant, by its attorneys of record, Dunne, Phelps & Mills, having executed and filed this date a stipulation providing for a stay of execution and enforcement of the judgment heretofore entered in this action on January 25, 1975, and good cause appearing,

IT IS HEREBY ORDERED that enforcement of the judgment heretofore entered in the above-entitled action in favor of plaintiff Ronald Dean Johnson and against Southern Pacific Transportation Company and execution on said judgment be and hereby is stayed for a period of thirty days from the date of this Order.

IT IS FURTHER ORDERED that, in the event defendant Southern Pacific Transportation Company files a petition for certiorari and performs all other acts necessary to seek review of the case by the Supreme Court of the United States of America on or before the end of said thirty day period, enforcement of said judgment and execution thereon be and is stayed until said Supreme Court rules upon said petition and, thereafter, subject to further order of this Court.

Dated: May 24, 1977.

[illegible]
Judge of the Superior Court